Supreme Court of the United States

October Term, 1964

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1964

No.

KARL HALLER and MARIA HALLER,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, KARL HALLER and MARIA HALLER, respectively pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 7, 1964, affirming the jury's verdict for convictions in the Southern District of New York for mail fraud, fraud by wire, and conspiracy, 18 U.S.C.A. Sections 371, 1341 and 1343, and from sentences of one year's imprisonment imposed by the Honorable Thomas F. Murphy, District Judge of the United States District Court for the Southern District of New York.

Opinions Below

The opinions of the Federal District Court (Appellants' Appendix, pp. 50-51, 55), written by District Judge Thomas F. Murphy, denying both the initial motion and the amended

motion to dismiss the action for want of prosecution pursuant to the United States Constitution, the Sixth Amendment thereof, and Rule 48(b) of the Federal Rules of Criminal Procedure thereof, are unreported. The opinion of the Court of Appeals, printed in the Appendix hereto, Appendix A, *infra*, pp. , , *et seq.*, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 7, 1964 (Appendix B, pp. , *et seq.*). Upon application duly made for an extension of time in which to file a petition for a writ of certiorari, Mr. Justice Potter Stewart, on August 5, 1964, ordered that the time for filing a petition for writ of certiorari be extended to and including September 5, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the Postal Agents without a warrant of arrest, were authorized to arrest and take into custody the appellants herein, or, whether this arrest was a subterfuge and a pretext to hinder the lawful business of the appellants?

2. Whether there was a reasonable ground for the exclusion of certain evidence which was allowed into the record by the trial judge over the appellants' objections denying them due process of law under the Fifth Amendment, and whether or not the appellants received a fair and impartial trial?

3. Whether the Court of Appeals erred in affirming the lower court's ruling depriving the appellants of their constitutional rights under the Sixth Amendment, and under Rule 48(b) of the Federal Rules of Criminal Procedure?

4. Whether the trial judge erred in the denial of the appellants' motion for a judgment of acquittal notwithstanding the verdict, or in the alternative for a new trial under Rule 29 of the Federal Rules of Criminal Procedure?

5. Whether the trial judge erred in his charge to the jury in failing properly to instruct the jury that charges are not to be predicated by piling inference upon inference in order to grant the appellants a fair and impartial trial, or whether the failure of the trial judge to instruct the jury on this important element was prejudicial as to the appellants' rights and reversible error?

Statutes, Federal Rules and Laws Involved

The pertinent portions of the Fourth, Fifth and Sixth Amendments to the United States Constitution (Appendix D, at p.), and Federal Statutes, Title 18 U.S.C.A. 371, 1341 and 1343 (Appendix C, *infra*, p.) and Rules 48(b) and 29 of the Federal Rules of Criminal Procedure (Appendix D, *infra*, p.).

Statement of the Case

The appellants, Karl Haller and Maria Haller, were arrested on December 8, 1958, by postal agents, without a warrant of arrest, at the offices of Rocco Moles, Esq., an attorney representing A. Cavaglieri Inc., of Lindenhurst, Long Island, New York, where Karl Haller had gone with

his wife to execute a contract for the lease and option to purchase the land and buildings of the aforementioned to be used for the manufacturing purposes intended by the petitioner, Karl Haller. That the petitioner, Karl Haller, was prevented from executing any contract or otherwise attending to his business, and both he and his wife were taken from the said premises to the Southern District Court House where they were later arraigned. Bail was set at $2500, for petitioner, Karl Haller, and co-petitioner, Maria Haller, was released on her own recognizance.

It is submitted that on November 14, 1958, an indictment was filed against Karl and Maria Haller, in the Southern District of New York, charging seven counts, counts one through four charging mail fraud (18 U.S.C.A. §1341); counts five and six charging fraud by wire (18 U.S.C.A. §1343); the seventh count charging a conspiracy to violate both of these provisions (18 U.S.C.A. §371).

On January 13, 1959, petitioners filed a motion to dismiss the seventh count of the indictment, coupled with a motion for the inspection of the Grand Jury minutes and a motion for a bill of particulars.

On July 11, 1960, the Honorable Frederick V. P. Bryan, denied petitioners' motion to dismiss the seventh count of the indictment after the motion was held in abeyance for eighteen (18) months pending the outcome of a case before the United States Supreme Court, *Dege* v. *United States*, 364 U.S. 51 (decided June 27, 1960); and further denied the motion for the inspection of the Grand Jury minutes. The motion for a Bill of Particulars was granted as to five (5) items only. The Bill of Particulars was not served or filed by the U.S. Attorney until some three (3) years later,

that in and of itself controverts any claim by the United States Attorney's office that they were ready to proceed to trial during that period. The delay in providing the Bill of Particulars was unreasonable and was not due to any adjournment by the petitioners herein

To controvert the affidavit of Michael S. Fawer, a special assistant United States Attorney in the office of Robert N. Morgenthau, U.S. Attorney, which was submitted in opposition to petitioners' motion to dismiss wherein he set forth that the petitioners were not represented by counsel on May 24, 1961, June 26, 1961, June 28, 1961, and September 18, 1961, and hence were not ready to proceed to trial, we submit that the affidavit of William T. Mulcahy of the law firm of McAloon and Hirschberg states unequivocally that he or another member of his law firm were in court on each of the dates set forth representing the petitioners and that as early as April 25, 1961, the co-petitioner, Maria Haller, spoke out in open court and stated that she wanted to go on trial (App. pp. 37, 38 and 39).

That on November 14, 1961, co-petitioner, Maria Haller, was illegally incarcerated for a period of eleven (11) weeks on an alleged bad check charge which check had some nine months sooner been replaced, the complainant paid in full, and the charge dismissed. That due to co-petitioner, Maria Haller's inability to appear, the Honorable Judge Levet, on November 14, 1961, (although she could have been in court at the request of the United States Attorney's office) her bail was set at $5,000, and on January 17, 1962, the said bail was reduced to $1,000. After said date and for more than a period of seventeen (17) months thereafter, the government made no effort to prosecute the case.

The trial judge at the inception of the trial stated in open court that he had on June 15, 1963, set down the trial date for September 30, 1963, the aforementioned U.S. Attorney, Michael S. Fawer, stated in his affidavit that the same trial date had been set by the court on June 17, 1963, and that on the same date the co-petitioner, Maria Haller, filed a motion to dismiss for want of prosecution pursuant to the Sixth Amendment of the United States Constitution and Rule 48(b) of the Federal Rules of Criminal Procedure. This motion as well as the amended motion for the same relief were denied on the basis that the right to a speedy trial was waived. Under the Second Circuit rule the period begins with the defendant's first clear demand and ends with the first day of trial. The lower court arbitrarily fixed the period from June 17, 1963 to September 30, 1963. Under *Marshall* v. *United States* (D.C. Cir., June 30, 1964) the Court of Appeals for the District of Columbia, considered the whole time from the indictment to trial and concluded that the defendant had been denied a speedy trial. They found the period of thirteen months excessive.

It is submitted that the evidence which was submitted during the trial with respect to business operations of the petitioners both in California and New Orleans were in no way remotely connected with the activities which were the subject of this particular indictment and the failure to exclude this extraneous testimony over the petitioners' objection prejudiced the petitioners' rights and should not have been admitted into evidence in this case. A witness cannot be asked on cross-examination, in order to affect his credibility about his part in transactions irrelevant to the issues on trial (*Jones* v. *Conn.*, 1951, 99 N.E. 2nd 456;

827 Mass. 491; *U.S.* v. *Pennix*, C.A.N.C., 1963, 313 F. 2d 524).

The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence and to secure to all persons equal and impartial justice under the law. Parts of the record showing error cannot be ignored on a mere conjecture that the jury might not have heard or relied upon the testimony which that part of the record represents (*Stewart* v. *U.S.*, 1961, 81 S. Ct. 341, 366 U.S. 1, 6 L. Ed. 2d 84).

Through the admission of irrelevant and extraneous evidence, the trial judge inadvertently created a hostile atmosphere which was detrimental to the rights of the petitioners herein and highly prejudicial, and by reason thereof the petitioners did not receive a fair and impartial trial, in violation of the Fifth Amendment.

The petitioners were further prejudiced by the admission of evidence not material to the issues at hand and failure properly to charge the jury that the charges could not be predicated by piling an inference upon an inference. Even with the Court of Appeals opinion, the inference is inescapable that the affirmance was based upon irrelevant evidence which was deduced from the beclouded issues on the record, relative to the operations in California.

Reasons for Granting Writ

1. The decision below should be reviewed because the constitutional issues raised herein were completely disregarded by postal agents all in violation of the Fourth Amendment of the Constitution (See: *Gatlin* v. *U.S.*, C.A.

D.C., 1963, 326 F. 2nd 666; *Staples* v. *U.S.*, C.A. Fla., 1963, 320 F. 2nd 817; *Mallory* v. *U.S.*, App. D.C., 1957, 77 S. Ct. 1356, 354 U.S. 449).

2. The further constitutional issue raised by the violation of the Fifth Amendment to the Constitution makes this petition compelling. The lower court's complete disregard for the petitioners' rights is patently evident. The lower court's charge to the jury by the trial judge wherein he allows an inference on an inference to be predicated upon unrelated facts, instead of explaining to what degree such circumstance and inference therefrom could be utilized (See: *Ingram* v. *U.S.*, 360 U.S. 672). Under the law the gravamen of a conspiracy is an agreement to commit an unlawful act. The mere knowledge, approval or acquiescence in object or purpose of a conspiracy does not make one a conspirator (See: *Dennis* v. *U.S.*, C.A. Colo., 1962, 302 F. 2nd 5; *Rabinowitz* v. *U.S.*, C.A. Minn., 1963, 324 F. 2nd 775).

3. Again, testing the application of the Sixth Amendment in the crucible of legal strain, the decision in this proceeding is diametrically opposed to the principle enunciated in the matter of *Marshall* v. *United States* (Slip Opinion D.C. Cir.), decided June 30, 1964. It is a complete departure from the rule stated in the Second Circuit, in *U.S.* v. *Lustman*, 258 F. 2nd 475, cert. denied, 79 S. Ct. 118 (1958), wherein a person is said to have waived his right to a speedy trial unless the defendant makes a clear, unequivocal demand for a trial. On the other hand, the *Marshall* case, *supra*, decides unequivocally that a defendant is entitled to a speedy trial, and failure to provide the same for the defendant will be cause for dismissal of the indictment.

The question, therefore, presented by the case, is of great and recurring significance in the problem of speedy trials. The serious questions of public policy involved here and the effect of the decision in this proceeding, if unreversed, will continue disparity among the various Federal Circuits. It, therefore, becomes an appropriate question for the exercise of this Court's discretionary jurisdiction (*U.S.* v. *Apex Distributing Co.*, C.A. Wash., 1959, 270 F. 2nd 747; *Hoopengarner* v. *U.S.*, C.A. Mich. 1959, 270 F. 2nd 465; *U.S.* v. *Sawyers*, D.C. Cal., 1960, 186 F. Supp. 264). It can readily be ascertained that the Second Circuit is in conflict with a number of other Federal Circuits. The defense of good faith asserted by the petitioners to the charges was not properly considered as the jury charges omitted an adequate reference thereto, making petitioners at least entitled to a retrial by reason of the constitutional infringements of the petitioners' rights during the trial (*Beck* v. *U.S.*, 305 F. 2nd 595, 9 L. Ed. 2nd 123, 128; *U.S.* v. *Harris*, 261 F. 2nd 792; *Bartchy* v. *U.S.*, 319 U.S. 484, 63 S. Ct. 1206, 87 L. Ed. 1534).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

CALLY & CALLY, ESQS.
by JAMES J. CALLY and T. W. D. DUKE
Attorneys for Petitioners
150 Broadway
New York 38, New York

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 339—September Term, 1963.

(Argued April 6, 1964 Decided July 7, 1964.)

Docket No. 28617

UNITED STATES OF AMERICA,

Appellee,

—v.—

KARL HALLER and MARIA HALLER,

Appellants.

Before:

LUMBARD, *Chief Judge,*
MOORE and SMITH, *Circuit Judges.*

Appeals from judgments of conviction by a jury for mail fraud, fraud by wire, and conspiracy, 18 U. S. C. §§1341, 1343, 371, entered in the United States District Court for the Southern District of New York, Thomas F. Murphy, *J.*

Affirmed.

CHARLES A. STILLMAN, Assistant U. S. Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, and Peter Fleming, Jr., Assistant U. S. Attorney, New York, N. Y., on the brief), *for appellee.*

GEORGE J. KAMBUR, New Orleans, La. (Donovan, Leisure, Newton and Irvine, New York, N. Y., on the brief), *for appellants.*

LUMBARD, *Chief Judge:*

These appeals by Karl and Maria Haller from their convictions in the Southern District of New York for mail fraud, fraud by wire, and conspiracy, 18 U. S. C. §§1341, 1343 and 371, and from sentences of one year's imprisonment, raise three questions: (1) whether the proof was sufficient to support the convictions, (2) whether the defendants were denied their right to a speedy trial, and (3) whether the court should have granted a continuance to permit the defense to take the deposition of a foreign witness. We find ample proof to support the jury's verdict. As we find that the delay in trial was almost entirely at the behest of the defendants, and that the trial judge committed no error in refusing to grant a further continuance, we affirm the convictions.

The record contains ample evidence to support the convictions, as the jury could have found the facts to be as we now summarize them: The advertisement which Karl Haller placed in late August 1958 in the Staats Zeitung und

Herold, and which solicited private investment of from $5,000 to $10,000 in a businses venture, came through the mail to a fellow employee of Walter and Maria Roos. When the Rooses responded by mail the Hallers visited them and explained that Karl Haller wanted to open a candy factory in New York, that they already had a factory located on the Hudson River, that they were then operating a candy factory in Los Angeles but summer heat and transportation costs made shipments to New York impractical. They gave the Rooses a bag of candy which they said had come from the Los Angeles factory. The Hallers said they needed the money within two days and the Rooses withdrew $4,456 which they had in two savings banks and paid it to the Hallers on September 11, 1958. In return the Rooses received Karl Haller's promissory note and a contract written in German which provided they might withdraw their money after twelve months.

All of these representations and many more were false and known to the Hallers to be false. This was in large part confirmed by Karl Haller, who testified in his own behalf. He said that he did not know what had been done with the money, but that it had been given to his wife, never used for the business in which the Rooses thought they were investing, and never returned. Maria Haller did not testify.

The Hallers' subsequent evasions led the Rooses to complain to the postal inspectors. Finally, on December 8, 1958, when the Hallers appeared in Lindenhurst at an attorney's office to confer with one Cavaglieri with respect to renting, with an option to buy for $50,000, a factory Cavaglieri had used for manufacturing noodles and sauces, they

were met by postal inspectors who accompanied them to Manhattan where they were held to answer charges in an indictment which had been filed in the Southern District of New York on November 14.

The Hallers assert that they were denied their right to a speedy trial guaranteed by the Sixth Amendment. While it is true that almost five years elapsed before they were brought to trial, the postponements until June 1963 were had for good reasons and without objection on the part of the defendants, who at all times were enlarged on bail and, with the exception of a period of four months, were represented by counsel. It was only on June 17, 1963 when Judge Murphy set the case for trial on September 30 that Maria Haller moved for dismissal because she had not been granted a speedy trial.

In January 1959 motions had been made to dismiss the indictment which attacked the conspiracy count on the ground that husband and wife could not be co-conspirators. Decision was held in abeyance by Judge Bryan because the question was before the United States Supreme Court and he promptly denied the motion in July 1960 on the authority of *United States* v. *Dege*, 364 U. S. 51, decided June 27, 1960. Restored to the calendar in April 1961, the case was adjourned by consent five times until September 1961 when the defendants' counsel withdrew and several additional adjournments followed to permit the defendants to retain new counsel. One or both defendants failed to appear on one or more occasions and the court issued bench warrants for them. In January 1962, after bail had again been fixed for Karl Haller, the case was once more marked off the cal-

endar and it was not restored until June 1963 when Judge Murphy denied the motion to dismiss for failure to prosecute, citing *United States* v. *Lustman*, 258 F. 2d 475, cert. denied, 358 U. S. 880 (1958). Having been content to let the charges stand untried for almost five years, the defendants cannot now complain of prejudice because of the delay when it is altogether clear that they sought and welcomed the delay on the chance that they might never be brought to trial.

Nor was it error for Judge Murphy to refuse a continuance of the trial, sought by defense counsel on the morning of the day set for trial, in order to take the deposition of Cavaglieri, who had gone to Italy sometime in 1962. The defendants knew on June 17 that the trial would commence on September 30, ample time to secure the deposition. They had been represented by various counsel during the preceding years and they had as counsel in June 1963 the same counsel who represented them at trial. In any event their failure to procure Cavaglieri's deposition could not have prejudiced them as there was no issue as to anything concerning which he could have given testimony, namely, that the Hallers from some time in November 1958 had been in touch with him regarding his factory in Lindenhurst and that they went to a lawyer's office on December 8, 1958 to discuss the rental of the premises.

The other claims of error with respect to the charge and the admission of evidence are entirely without substance and merit no discussion.

The judgments of conviction are affirmed.

APPENDIX B

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 7th day of July, one thousand nine hundred and sixty four.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge.

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

—v—

KARL HALLER and MARIA HALLER,
Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment of United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of the said District Court be and hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

Statutes

18 U.S.C.A. §371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C.A. §1341. Frauds and Swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretense, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office

Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C.A. §1343. FRAUD BY WIRE, RADIO, OR TELEVISION.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years or both.

APPENDIX D

Constitutional Provisions Involved

CONSTITUTION OF THE UNITED STATES:

"ARTICLES IN ADDITION TO, AND AMENDMENT OF, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION

ARTICLE IV. The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Miscellaneous

FEDERAL RULES OF CRIMINAL PROCEDURE:

"Rule 48. DISMISSAL.

(b) BY COURT. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

Rule 29. MOTION FOR ACQUITTAL.

(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence of either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 461

KARL HALLER AND MARIA HALLER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 333 F. 2d 827.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1964 (Pet. App. B). On August 5, 1964, Mr. Justice Stewart extended the time for the filing of a petition for a writ of certiorari to and including September 5, 1964, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners have been denied a right to a speedy trial.

2. Whether the evidence was sufficient to support the convictions.

3. Whether there were errors at the trial.

STATEMENT

Petitioners were convicted on November 7, 1963, in the United States District Court for the Southern District of New York on four counts of an indictment charging mail and wire fraud and conspiracy to commit these offenses in violation of 18 U.S.C. 1341 and 1343 (R. I 3). Each was sentenced to imprisonment for one year on each count, the terms to run concurrently (R. I 3-4).[1] The court of appeals affirmed.

1. The scheme charged was that petitioners solicited money from would-be investors by falsely representing that they were were planning to open a candy factory in New York and were then operating such a factory in Los Angeles.

The evidence showed that petitioners placed an advertisement in a New York-issued German-language newspaper representing that they were manufacturers with a name well known in Europe and America who were looking for a silent or active partner willing to invest $5,000 to $10,000 in a factory to be opened in New York. On about August 31, 1958, the advertisement, sent through the mail, reached a German immi-

[1] The appellant's appendix in the court below is designated in this Court as Volume I of the record, and the government's appendix as Volume II. We are lodging a transcript of trial proceedings referred to herein as "Tr." We are also lodging minutes of pretrial proceedings.

grant couple, Walter and Maria Roos, who were employed as cooks in a private school in New Jersey and who had been in this country for a little more than a year (R. II 2a-4a). The Rooses responded by mail to the advertisement and the Hallers visited them at the New Jersey school shortly thereafter (R. II 5a). Karl Haller showed the Rooses an identification card and a seal, said he was the son of the owner of the Haller chocolate factory in Stuttgart, Germany, and that he would like to open a factory in New York (R. II 8a-9a, 6a, 24a-26a). Maria Haller added that for this purpose they already had a factory located on the Hudson River (R. II 6a, 25a). The Hallers said that they were then operating a candy factory in Los Angeles which was run by Mrs. Haller's brother, but that the trans-country shipment of the candy was impractical because of the summer heat and high cost of transportation (R. II 7a, 25a). Karl Haller produced some papers represented as being orders already delivered to customers, which the Rooses could not read as they were written in English (R. II 7a). He gave the Rooses a bag of chocolate candy which he said had been produced at the Los Angeles factory and cautioned them not to speak of the proposed new factory because it was a "business secret" (R. II 7a, 10a).

The Rooses told the Hallers that they had only $4,456 to invest and suggested that it might not be enough. The Hallers said that they would take it (R. II 24a) and that they would need it within two days since they expected to begin operation in three weeks (R. II 10a, 26a). Two days thereafter Maria Haller accompanied Roos to two banks from which he withdrew his family savings of $4,456 (R. II 10a-11a). That evening Roos received a contract from Haller

written in German and turned over the money (R. II 12a-13a). When Roos said he would like an English contract also, Haller promised he would prepare one in 14 days when his secretary came from California. A second contract also written in German provided that Roos must give twelve months' notice before he could withdraw his money (R. II 12a, 14a-15a).

The Rooses thereafter met or talked by telephone with the Hallers upon several occasions in September, October and November 1958 (R. II 13a, 17a, 18a, 19a). The Hallers assured the German couple that everything was all right with the business. Upon one occasion Maria Haller told Roos that she could not show him the factory because the owner who had the key was on vacation (R. II 13a, 26a). Upon another occasion she showed him a letter (which Roos could not read) which she represented as having come to her from lawyers relative to a competitive product made by General Mills (R. II 19a). When Roos expressed concern, she told him he had nothing to worry about since the factory in Los Angeles was still operating (R. II 19a). Karl Haller assured Roos that after some initial advertising they would be ready to start business (R. II 20a). In a last telephone conversation on November 30, he told Roos that everything was all right and that the contract for the factory would be signed in two days (R. II 21a).

The Hallers never opened a factory in New York and the money of the Rooses was never returned (Tr. 44). Karl Haller testified that the money had been given to his wife, that he did not know where she was holding it, and that it had not been used for the business in which the Rooses thought they were investing (Tr. 246, 259-260). The Hallers had in fact op-

erated a factory in Los Angeles for a period of time prior to the Roos transaction in September 1958 (R. II 29a), but it had ceased operation prior to June 1958 when all the candy-making equipment was sold at auction in a mortgage foreclosure (R. II 31a, 32a, 34a; Tr. 186-187).

The Hallers were arrested on December 8, 1958, after they appeared in Linderhurst Long Island, at an attorney's office to confer with respect to renting, with an option to buy, a factory owned and used by one Cavaglieri for manufacturing noodles and sauces. Warrants for their arrests had been issued on November 14, 1958, the date of the indictment (R. I 1; Tr. 143-151). A post office inspector testified that he did not have the warrant with him when he saw petitioners in Long Island. He asked them to come, and they came voluntarily, to the United States Attorney's office in the Southern District where they were arrested (Tr. 157-160).

2. Petitioners were enlarged after apprehension—Mrs. Haller upon her own recognizance and Mr. Haller upon bond of $2,500 (See Minutes 1/30/62, p. 6). On January 13, 1959 (two months after the return of the indictment) petitioners attacked the indictment (R. I 2) on the grounds *inter alia* that a husband and wife could not be co-conspirators. Decision was held in abeyance by the district court because this issue was then pending before this Court. The petitioner's motion was denied on July 12, 1960 (R. I 2) on the authority of *United States* v. *Dege*, 364 U.S. 51, decided June 27, 1960. The case was restored to the calendar by the government on April 25, 1961, and adjourned by consent to May 24, June 26, June 28 and September 18. (R. I 2, 56-58; Minutes 4/25/61, 5/24/61 pp. 1-3). On this latter date, September 18,

1961, Mrs. Haller appeared in court without counsel,[2] and indicated that she would be "pleased" if defense counsel McAloon were permitted to withdraw. The case was adjourned to September 25 to permit the matter to be settled (Minutes 9 18 61). On September 25, Mr. McAloon requested permission to withdraw as counsel because he had not been properly compensated and had been unable to communicate with petitioners. Mrs. Haller, who was late for this court appearance, resisted the requested withdrawal but stated that she had no confidence in Mr. McAloon. Thereupon the court relieved counsel and instructed petitioners to be in court with new counsel on October 2, prepared to fix a date for trial (Minutes 9 25 61, p. 14). Thereafter on several occasions petitioners appeared in court without counsel despite specific instructions of the court that they appear with counsel and adjournments for that purpose (See Minutes 10 2 61; 11 6 61; 11 13 61 a.m. and p.m.; 11 14 61 a.m. and p.m.).

On the first of these occasions the court, after repeated inquiries, drew from Mrs. Haller only the representation that she had a lawyer in Washington. Later she gave the court the name of a well-known Washington lawyer and made representations as to his impending arrival to represent the defense. On November 14, 1961, government counsel apprised the court that he had been in personal touch with the Washington lawyer who had stated that, while Mrs.

[2] Petitioners were originally represented by the law firm of Garey & Garey and, upon its withdrawal in April 1959, by McAloon and Hirschberg. In January 1962, Attorneys Robert Hall and Samuel Siegel appeared for petitioners. At trial they were represented by Attorney George Kambur who first appeared for Mrs. Haller in June 1963 and Mr. Haller on the morning of trial (R. II 8).

Haller had been in touch with him, he had made no commitments as to representation or appearance. Because of these circumstances, and the fact that petitioners had given the court false information as to their addresses, government counsel asked that bail be fixed at $5,000 for each of the petitioners. Petitioners were directed to return to court on November 17 with counsel (Minutes 11/14/61, p. 46).

On November 17, 1961, neither petitioner was represented and government counsel advised that they had been arrested by State police. The case was marked from the calendar (Minutes 11/17/61).

The case was restored to the calendar in January 1962 when Mrs. Haller, on release from State custody, appeared in open court with attorneys Siegel and Hall to ask for reduction of bond. The request was granted, Mrs. Haller was released in the custody of counsel and the case adjourned until January 17 when it was again marked off the calendar because Mr. Haller was still incarcerated on the local charge (R. II 9). On January 30, 1962, the case was restored to the calendar to reduce bail for Mr. Haller (who had then served some 11 weeks in State custody) and once again marked off the calendar (Minutes 1/30/62 pp. 3, 9).

In June 1963 the case was restored to the calendar and the trial date set for September 30. It was then, on June 17, 1963, that petitioners moved to dismiss the indictment for lack of a speedy trial (R. I 2, 30-32). The district court denied the motion in August 1963 (and upon reargument adhered to its decision on September 18, 1963) on the ground that the record showed a waiver of the right to a speedy trial by failure to assert it (R. I 50-51, 55).

The case went to trial on September 30, 1963, after the trial court overruled a motion for adjournment by defense counsel Kambur (See fn. 2, p. 6, *supra*) on the ground that he had had insufficient time to prepare a defense or secure the deposition of a witness (Tr. 3-7).

ARGUMENT

Petitioners never demanded an early trial or voiced any objection to an adjournment,[3] although throughout the period between indictment and trial (except for a four month period attributable to their own dilatory tactics) they were represented by retained counsel. As the court below noted, it is evident that they sought and welcomed the delay on the chance that they might never be brought to trial.

Under these circumstances, this case falls within the settled rule that the failure to demand a speedy trial constitutes a waiver of the right thereto. *United States* v. *Lustman*, 258 F. 2d 475 (C.A. 2), certiorari denied, 358 U.S. 880; *United States* v. *Hill*, 310 F. 2d 601 (C.A. 4); *Harlow* v. *United States*, 301 F. 2d 361 (C.A. 5), certiorari denied, 371 U.S. 814; *Worthington* v. *United States*, 1 F. 2d 154 (C.A. 7), certiorari de-

[3] The statement made by Maria Haller in open court on April 25, 1961 cannot be read as an objection. She said that she and her husband had been under tremendous strain and would like to have "this thing over," that they would like to ask for their "doctor's permission" and have him notify the court, that for the time being they "would like to take the day [that] has been given to us" and that "when the time is set" she would have something shocking to say. Counsel stated there was no objection to adjournment (R. I. 56-57).

The affidavit of counsel for Mrs. Haller filed in support of her motion to dismiss for a lack of a speedy trial (made in June 1963 when the final trial date was set) recites that "no previous application has been made." (R. I. 32).

nied, 266 U.S. 626; *Shepherd* v. *United States*, 163 F. 2d 974 (C.A. 8); *Collins* v. *United States*, 157 F. 2d 409 (C.A. 9); *Pietch* v. *United States*, 110 F. 2d 817 (C.A. 10), certiorari denied, 310 U.S. 648. See, also, *Pollard* v. *United States*, 352 U.S. 354, at 362, fn. 8, and *United States* v. *Provoo*, 350 U.S. 857, affirming 17 F.R.D. 183 (D. Md.).

Petitioners claim a conflict with the decision of the District of Columbia Circuit in *Marshall* v. *United States* (C.A.D.C. No. 18047, decided June 30, 1964), where the court found denial of a speedy trial although there had been no demand for a speedy trial prior to the *first* of three motions to dismiss the indictment. The facts in *Marshall* were, however, very different from the situation here. Marshall was an indigent defendant, charged with a capital offense, who had been incarcerated in jail or in a mental institution for over three years during the period between indictment and a third trial. The court of appeals found that the delay there had been oppressive and that the defendant had been fatally prejudiced, since, during the delay, he became unable to communicate effectively and was thus unable to testify in his own defense. Petitioners here were out on bail, were represented by their own counsel, and can show no prejudice.[4] A considerable part of the delay is attributable to the filing of a motion by petitioners, adjournments to which they consented, postponements granted for the

[4] The suggestion that petitioners were prejudiced by the departure of Cavaglieri from this country is of no merit. The evidence to which he could have testified was before the jury and was not in dispute—*i.e.*, that petitioners had, from some time in November 1958, been in touch with him with respect to a factory which he owned and that they went to a lawyer's office on December 8, 1958 to discuss the rental of these premises.

purpose of permitting them to retain counsel, or their absences due to their own criminal activity. They are thus in no position to complain of lack of a speedy trial.

2. There is no occasion for this Court to review evidence found to be sufficient to support conviction by both courts below. The proof as to the solicitation of investments, the use of the mails and wires, the acceptance of some $4450 from the Rooses was undisputed. The defense was good faith. Both Mr. and Mrs. Roos testified that the Hallers represented *inter alia* not only that they intended to open a factory in New York, but that they were then operating a factory in California. This latter representation (which Haller denied that he made) was admittedly false by Haller's own testimony. From this and the evidence of the overall representations made by petitioners, the lulling techniques used to keep the Rooses from complaining, and the testimony of Haller himself that he did not know what had become of the money of the Rooses, the jury had more than sufficient basis to conclude that the Hallers never intended to use the money for investment purposes but were engaging in a scheme to defaud.

3. The other issues urged by petitioners do not merit the attention of this Court. The charge of an illegal arrest is urged for the first time here. The record shows that at the time petitioners were arrested by postal inspectors (on December 8, 1958) there was an outstanding warrant for their arrest issued on November 14, 1958, the date of indictment (R. I. 1). The claims of error in the admission of evidence and the charge to the jury were properly dismissed by the

court below without discussion as being entirely without substance. The question of the Los Angeles operation was in issue in the case. Since Karl Haller testified on direct examination as to the success of this venture (R. II 34a-35a), as well as to his interest in a New Orleans venture (Tr. 168), cross-examination as to these operations was entirely proper (See Tr. 230, 234). No objection was voiced as to cross-examination relative to a prior conviction for passing a bad check, nor was this improper (Tr. 244-245). As to the contention that the trial court erred in not charging that "the charges could not be predicated by piling an inference upon an inference" (Pet. 3, 7), petitioners requested no such charge, nor did they except to its omission or to any portion of the instructions given. The charge set forth clearly and at length the contentions of the defense and the thrust of that defense as to good faith (R. I 8, 9).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.
Assistant Attorney General.

BEATRICE ROSENBERG,
JULIA P. COOPER,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

KARL HALLER and MARIA HALLER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION

CALLY & CALLY, ESQS.
By: JAMES J. CALLY, and T. W. D. DUKE
Attorneys for Petitioners
150 Broadway
New York 38, New York

Gilbert Press Inc., 421 Hudson St., N.Y.—ORegon 5-4540

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The most eminent Justice of the liberal tradition once said that "most men think dramatically, not quantitatively" (Holmes, "Law and the Court", in collected legal papers 293 (1921)). If this is true, a reading of the trial transcript of this action ought to excite some wonder and little meditation. This case presents a means of administering justice unobstructed with the impedimenta of due process, evincing a wanton disregard of the constitutional guarantees provided and afforded to the accused herein; and quite contrary to the absolute and primary essential safeguards which are necessary and salutary in the protection of individual rights in order to assure fair treatment in criminal prosecutions.

The background setting is sufficiently theatrical: the illegal and unauthorized arrest of the defendants by Postal Officials, without warrant, designed and executed with precise timing to prevent the said petitioners from completing their transaction in furtherance of the agreement with the complainants, and conspiracy between the postal authorities and Walter Roos to entrap petitioners. Then there were the court created delay of 18 months to await a decision of the *Dege* v. *United States* case; the dilatory tactics of the prosecutor; and the allowance of improper and unrelated evidence by the trial judge over the objections of defense counsel, all of which were highly prejudicial to the cause of the defendants and fatally detrimental to defendants when the same was presented to the jury. The trial judge erred in failing to instruct properly the jury as to the inferences set forth and further erred in denying the motion of defense counsel after trial to acquit, notwithstanding the verdict, because of the insufficiency of evidence, or in the alternative, to grant a new trial. These are ingredients of a new jurisprudence.

The very foundation of the prosecution's case rests solely upon the inconsistent, varying and colored testimony of interested parties, to wit: the complainants, and without further substantiations or corroboration from any other source. The attention of the court is invited to the fact that although complainant could not comprehensively read English, when shown the copy of the agreement in English, he stated that it was the agreement with defendants. On the other hand, the contention of good faith on the part of the petitioners was upheld throughout.

The advertisement itself which was published in the New York issued German language newspaper and to which the

complainants responded indicated that the petitioners intended to *open* a factory in the New York Area and that some machinery and other materials were available for use for the contemplated venture.

Walter Roos and Karl Hailer entered into a contract to the mutual satisfaction of the parties, and to further secure Mr. Roos against loss, Karl Haller signed a personal promissory note for the repayment of the said principal amount and added interest of twelve (12%) percent repayable five (5) years from date, or, upon notice by Roos to Haller, the same would be paid twelve (12) months from the receipt of the notice. (By reference, in N. Y. State such interest beyond 6% is usurious, which defendants never sought to avail themselves of such fact.)

That thereafter as shown by the evidence, Karl Haller, did set out to acquire a factory and kept the Rooses informed of the progress, however, the delay occasioned in finding a suitable location and within only one (1) month after the money had been given herein to Karl Haller, the complainants were aroused by a seed of suspicion which caused them to go to see the postal authorities.

The testimony elicited from the defendant, K. Haller and a parade of other defense witnesses corroborated the statements which were made to the Rooses.

It is submitted that the petitioners herein demonstrated good faith at all times in their dealings with the Rooses, and good faith is a complete defense to a mail fraud charge or prosecution. (*Beck* v. *U. S.*, 305 F. 2nd 595, 9 L. Ed. 2nd 123; *U. S.* v. *Harris*, 261 F. 2nd 792.)

Respondents are straining to attempt to distinguish the case at bar, however, the facts of this case do not fall with-

in the settled rule. Here, one of the defendants to wit, Maria Haller, as early as 1961, stated in open court that she wanted to proceed to trial; and prior to this the court itself denied the petitioners the right of a speedy trial because of the court created delay, to await the decision of a case before the United States Supreme Court, *Dege* v. *U. S.*, 364 U.S. 51. It is submitted that dismissal is imperative in all cases of court-created delay wherein the prosecution is permitted to defeat prompt trial by pressing for tactical advantages. From the facts in this case it can be readily gleaned that the prosecutor has directly caused a delay in the trial of the action, and the petitioners have not waived their rights at any time during the proceedings.

In *Taylor* v. *U. S.* (1956), 98 U.S. App. D.C. 83, 238 F. 2nd 259, the court stated further that a defendant complaining that he has been denied his constitutional right to a speedy trial need not show that he was prejudiced by the delay.

We respectfully submit that the petitioners under recent decisions do not need to show "plain reversible error in their trial", but that the government is held to have the burden of showing that the appeal would be futile which we aver has not been done herein, and therefore, the requested relief should be granted.

Desmond v. *U. S.*, U.S.C.A., 1st Circuit, decided, June 25, 1964 (Vol. 152—No. 86, N. Y. Law Journal, Oct. 30, 1964, page 1);
Ellis v. *U. S.*, 365 U.S. 674 (1958).

It is further submitted that the allowance into evidence over objection of defendants' counsel that unrelated prior

acts that occurred in California concerning these defendants as manifested by the trial record and which were not part of any charges in this indictment, and not criminal acts, but were legal acts that were separate, distinct and committed at different times and places and not provable by the same acts charged herein, was evidence that was of substantial prejudice to defendants' case; and added to the distraction of the jury. The trial record indicates sufficient possibility of prejudice by reason that the jury may use the evidence of irrelevant acts not charged and not part of any alleged scheme, but allowed into evidence to infer criminal disposition on the part of defendants, and may cumulate this evidence with various violations charged and find guilt when, if considered separately, it would not so find. (*Nathan Drew* v. *U. S.*, U.S.C.A., District of Columbia Circuit, decided February 13, 1964, Volume 151, No. 128, N. Y. Law Journal, June 30, 1964, Page 1; and *McElroy* v. *U. S.*, 164 U.S. 76.)

When the prior acts have no relevance to acts committed and with which defendants are charged with crimes, said acts are inadmissible. The tendency is to create hostility, surprise and confusion of issues, and the law endeavors to preclude the danger of unfair prejudice. These acts were not charged, in the case at bar, as being a part of any scheme, and the appellate courts have stated that the majority of average intelligent people acting as jurors are prone to draw illogical and incorrect inferences and conclusions without adequate foundation, and when such acts are permitted to be introduced as evidence in trials as herein, they result in reversible error, necessitating at least a retrial.

Underhill, Criminal Evidence, Sec. 205 (5th Ed. 1956);
Martin v. *U. S.*, 127 F. 2nd 865;
Boyer v. *U. S.*, 132 F. 2nd 12.

For the foregoing reasons set forth herein, and in our petition, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

CALLY & CALLY, ESQS.
By: JAMES J. CALLY, and T. W. D. DUKE
Attorneys for Petitioners
150 Broadway
New York 38, New York

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PETITION FOR REHEARING

CALLY & CALLY, ESQS. and
T. W. D. DUKE, ESQ.
By: James J. Cally
Attorneys for Petitioners
150 Broadway
New York 38, New York

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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UNITED STATES OF AMERICA, *Respondent.*

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PETITION FOR REHEARING

Petitioners respectfully request that this court grant a rehearing of its order, dated November 23, 1964, which denied the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit, and that the court now grant certiorari, and in support of their petition for a rehearing, petitioners respectfully show:

First: The petition for writ of certiorari previously filed herein presented the following questions:

(a) Whether the Postal Agents without warrant of arrest, were authorized to arrest and take into custody the appellants herein, or, whether this arrest was a subter-

fuge and a pretext to hinder the lawful business of the appellants?

(b) Whether there was a reasonable ground for the exclusion of certain evidence which was allowed into the record by the trial judge over the appellants' objections denying them due process of law under the Fifth Amendment, and whether or not the appellants received a fair and impartial trial?

(c) Whether the Court of Appeals erred in affirming the lower court's ruling depriving the appellants of their constitutional rights under the Sixth Amendment, and under Rule 48(b) of the Federal Rules of Criminal Procedure?

(d) Whether the trial judge erred in the denial of appellants' motion for judgment of acquittal notwithstanding the verdict, or in the alternative for a new trial under Rule 29 of the Federal Rules of Criminal Procedure?

(e) Whether the trial judge erred in his charge to the jury in failing properly to instruct the jury that charges are not predicated by piling inference upon inference in order to grant the appellants a fair and impartial trial, or whether the failure of the trial judge to instruct the jury on this important element was prejudicial as to the appellants' rights and reversible error?

Second: The petition for writ of certiorari discussed the importance of the questions presented and its great impact upon the sound administration of justice, in view of the clear and express conflict of decisions among the circuits with respect to the question designated Number 3, which appears on page 3 of the petition for writ of certiorari and cited hereinabove. The prevailing or majority opinion in

its interpretation requires that the defendant demand trial or resist postponement, while on the other hand the minority opinion requires only that a motion be made to dismiss before trial so as to determine the period of time to be calculated so as to show a denial of a speedy trial. Arguendo, if we are to show only the latter facts, it is safe to assume that the delay in the trial of this case was in fact created by court delay and by the arbitrary and capricious delay of the prosecutor and that the petitioners herein did in fact assert their right to a speedy trial. The right to a speedy trial is very definitely a shield for the protection of the judicial safeguards of the petitioners and it is maintained that the test has been met by the petitioners and they should therefore be allowed the necessary latitudes in accordance with the democratic processes of our society.

Third: That our present knowledge is that Maria Haller did not participate in any funds acquired by Karl Haller, although the trial record is devoid of this contention.

Fourth: The petitioners stated that at the time of arraignment before Mr. Justice Edelstein, of the District Court of the United States for the Southern District of New York, Karl Haller gave his wallet over to Maria Haller, since he was detained pending bail; and Maria Haller was released on her own recognizance. That on the following day, when the said Karl Haller was released on bail, the wallet was returned to him intact by Maria Haller.

Fifth: That the said Maria Haller never participated in any plan proposed by Karl Haller, and his investors in a candy manufacturing plant.

Sixth: That the said complainants herein had been given a note for their investment, which included a twelve (12%) percent interest rate payment. No demand was ever made by the complainants for any payment thereof. (Note, N.Y. Law, holds any interest rate in excess of 6% to be usurious.)

Seventh: That the entire trial record is replete with judicial errors thereby causing an erroneous impression to be garnered by the jury, and this point is well taken by the respondent.

Eighth: That both petitioners herein were represented by the same counsel although their interests were conflicting, therefore, improperly represented.

Ninth: That the petitioner, Maria Haller, was not allowed to take the stand in her own defense by counsel, although he had promised her that she would do so, and proceedings have been commenced by the petitioner, Maria Haller, against her then counsel before the American Bar Assoeiation.

Tenth: Should the decision be allowed to stand on the record it could very well be an example of, "blind justice", whereby the innocent are made to suffer because of the improper administration of justice in the lower court.

CONCLUSIONS

For the reasons set forth in this petition for rehearing, as well as in the petition for writ of certiorari previously filed, rehearing and writ of certiorari should now be granted.

Respectfully submitted,

CALLY & CALLY, ESQS. and
T. W. D. DUKE, ESQ.

By: James J. Cally
Attorneys for Petitioners
150 Broadway
New York 38, New York

Certificate of Counsel

Pursuant to Rule 58, I hereby certify that the foregoing Petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2. of Rule 58.

JAMES J. CALLY